Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ABEL BERNARD MEDINA; BENJAMIN TIBURICO TORRES AND JESUS MANUEL CHAVEZ,

Petitioners,

vs.

EDWARD MILLER, INDIVIDUALLY AND AS AN AGENT FOR THE STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, BUREAU OF NARCOTICS; EARL BRAY, INDIVIDUALLY AND AS A DETECTIVE FOR THE KERN COUNTY SHERIFF'S DEPARTMENT; JOHN LACERTOSO, INDIVIDUALLY AND AS A SERGEANT FOR THE KERN COUNTY SHERIFF'S DEPARTMENT; J.C. PLANK, INDIVIDUALLY AND AS A DEPUTY FOR THE KERN COUNTY SHERIFF'S DEPARTMENT.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the doctrine of collateral estoppel apply where a criminal defendant, whose Fourth Amendment rights have been found to violated by peace officers in a prior state proceeding, files an action pursuant to 42 U.S.C. § 1983? or

Is a peace officer, who is a defendant in a 42 U.S.C. § 1983 action, precluded from litigating the issue of probable cause where a state court has found that there was no probable cause to arrest and the peace officer violated the Fourth Amendment rights of the plaintiff?

II. Pursuant to Federal Rules of Evidence, Rule 201, is a federal court required to take judicial notice of an opinion [judgment] of the Court of Appeals for the State of California?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix A — Memorandum Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed May 15, 1997 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Ninth Circuit Filed June 30, 1997 ..... 5a

Appendix C — Order Of The United States District Court, Central District Of California Dated May 5, 1995 With Attachments 7a

Petitioners Abel Medina, Benjamin Tiburico Torres and Jesus Menual Chavez, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith at 1a. The order of the district court in this case is reproduced at 7a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 are as set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

> judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The pertinent provisions of the Federal Rules of Evidence, Rule 201 are as set forth below:

> Rule 201. Judicial Notice of Adjudicative Facts
>
> (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When discretionary. A court may take judicial notice,whether requested or not.
>
> (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking

judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF THE CASE

Prior to January 1991, Respondent Edward Miller, an employee of the Department of Justice for the State of California, had been working on a case in which Petitioner Abel Medina was a suspect. Miller knew there was an outstanding warrant for Medina but did nothing to effect the arrest. In January 1991 at the request of Miller, Kern County Sheriff's Investigator Earl Bray began an investigation of Medina's activities at Medina's father's ranch located near Stallion Springs, Kern County. Although observations did not reveal any criminal activity, Bray contacted other law enforcement agencies to secure information about Medina. Miller told Bray that there was an outstanding arrest warrant for Medina that was issued April 25, 1990, from Los Angeles County. The Stallion Springs Police Department provided Bray with gossip and speculation covering an incident eight years prior concerning possible criminal activities occurring at the ranch. Despite this unreliable and limited information, Miller, Bray, Lacertoso along with other members

of the Kern County Sheriff's Department began a stake-out on the ranch on April 2, 1991. Bray began and supervised the three-day surveillance of the ranch.

The stake-out and surveillance revealed two vans and three or four Hispanic males staying at the ranch. The officers did not observe any illegal or suspicious activities. On April 3, at approximately 3:00 p.m., Deputy McKinley Mosley of the Kern County Sheriff's Department observed a white van leave the ranch. Certain members of the stake-out team, including Miller, followed the van to the town of Tehachipi. There they observed the four men in the van go into a hardware store. Miller followed the four men into the store, but made no contact with them.

While the white van was in town and there was nobody at the ranch, Plank, under the direction of Bray and Lacertoso, entered the ranch without a search warrant, probable cause or exigent circumstances. Plank entered the fenced private property (the ranch) under the pretext of checking up on the cattle theft report.[1] When later confronted in a suppression hearing, Bray admitted that his request for Plank to search the ranch had nothing to do with the cattle theft report but to look about for any signs of criminal activity.

Plank went on to the property by parking his vehicle next to the ranch's locked gate and jumping over the fence. Mosley observed Plank's movements and recorded them in his surveillance log, which he later turned over to Bray. While on the ranch, Plank did not find anyone present. He allegedly smelled PCP. Plank reported his findings to Bray a few hours after his visit to the ranch.

The van returned to the ranch and the stake-out and

1. On March 11, 1990, Plank had taken a cattle theft report from Abel Medina's father, Jose Medina.

surveillance continued until approximately 5:00 a.m. on April 4, when two vans were spotted leaving the ranch. Bray then ordered both vans stopped because he had a hunch that Abel Medina was on board one of those vans because Bray was told that no one was left at the ranch. The two vans in which Petitioners were riding was stopped and Petitioners were arrested for the manufacture of PCP.

On June 25, 1991, an amended information was filed in Kern County Superior Court charging Petitioners with eleven criminal counts. Prior to trial at a preliminary hearing, Petitioners moved to suppress the evidence discovered during the detention of the vans and the fruits of the search warrants served on the ranch house and two Los Angeles County residences; this motion was denied. During the suppression hearing, Bray testified that he was suspicious of narcotics activity at the ranch because there was no activity in the daytime; however, the lights were on all night. Bray also testified that he ordered the vans stopped on the belief that Medina was on board and he intended to arrest Medina for the outstanding warrant and on the belief that the nighttime activities were the manufacture of PCP based the eight year old information. Bray testified that the reason he believed that Medina was on board one of the vans was because no one was left at the ranch.

At the preliminary hearing, Bray did not produce the surveillance log that Deputy Mosley had prepared after Plank's illegal intrusion and did not mention Plank's illegal intrusion onto the ranch on the afternoon of April 3. Lacertoso testified that after he discontinued surveillance of the van in Tehachipi; he went back to Deputy Mosley's location which was near the ranch. Lacertoso testified that he could not remember what observations Mosley related to him.

At trial, Mosley reported his observations about what

happened at the ranch while the van was in town, namely that Plank had jumped the fence surrounding the ranch, entered the ranch and investigated and observed what was going on at the ranch. The Petitioners moved for a renewed suppression hearing, which was granted.

At the renewed suppression hearing, Bray, Lacertoso, Plank and Miller testified differently than their former testimony in light of the information provided by Mosley. Although the trial court noted that, "the officers' conduct in surreptitiously entering the ranch and suppressing the fact" held the entire system up to ridicule, and Bray's and Lacertoso's testimony was "obfuscatory at best and bordered on absolute lying," the Petitioners' suppression motion was again denied. The court found these Petitioners did not have standing to assert a Fourth Amendment right to the premises. Petitioners were subsequently convicted in the case entitled *People v. Abelardo Gamboa et al.*, Kern County Superior Court Case Number 45981. Petitioners were sentenced to terms ranging between 15 to 21 years and were remanded to custody in state prison.

Petitioners' appeal was heard by the California Court of Appeals for Fifth Appellate District. In the Opinion, the Court reversed and overturned Petitioners' convictions. Medina and Chavez had served 30 months in state prison while Torres was released several months later.

The unpublished opinion states, "The real problem in this case is created by the massive contradictions between the testimony of the investigating officer at the preliminary hearing and trial compared to the renewed suppression hearing after Deputy Mosley's disclosures." The Court was troubled by Bray's failure to turn over Mosley's surveillance log and the fact that Bray knew about the results of Plank's visit to the ranch. "Bray also admitted that the decision to stop the vehicles was made on

the evening of April 3rd, after he debriefed Plank, because Plank wanted to be in on the stop. This completely refutes Bray's preliminary hearing testimony that he decided to stop the vehicles based on [Deputy] Medina's[2] observations that all the lights had been shut off at the ranch and everyone was leaving." "As for Lacertoso, there isn't very much left of his testimony that could be considered credible. His preliminary hearing testimony now appears to have been carefully crafted to avoid any possible reference to his activities during the Tehachipi surveillance, his communications with Bray, and the information obtained from Plank." "Plank's testimony is similarly suspect since he confined his preliminary hearing responses only to the March cattle theft investigation" and left out his entry on the ranch of April 3, 1991 and his involvement in the arrest of Petitioners.

The appellate court also criticized Miller's action during the investigation. "At the renewed suppression hearing, Miller sought to back away from his positive identification of Medina in the hardware store and vaguely claimed that he really didn't get a good look at the suspects. If this testimony is accepted, then even the tenuous link between Abel Medina, the white van, and the ranch . . . evaporates." The court concluded, "Unfortunately, the record is replete with Bray's inconsistent, misleading and untruthful statements so that it is difficult to determine what he *really* knew on the morning of April 4th." The court then concluded that because Bray's decision to stop the vans was either based upon Plank's illegal incursion or upon a hunch without a sufficient factual basis, the evidence should have been suppressed and the convictions were reversed.

Petitioners were released from prison and filed this cause of action. On or about June 7, 1994, Medina, Torres and Chavez

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2. A deputy sheriff named Medina not the Petitioner.

filed a complaint in the United States District Court for the Central District of California alleging that Miller, the County of Kern, Earl Bray, a Kern County deputy sheriff, John Lacertoso, a Kern County deputy sheriff, and J.C. Plank, Kern County deputy sheriff violated Petitioners' constitutional rights pursuant to the Fourth and Fourteenth Amendments by searching and seizing the persons and property of the Petitioners. On or about October 24, 1994, Petitioners filed a request that the district court take judicial notice of a California Court of Appeal opinion in the matter of *People v. Gamboa,* Case No. F017155 dated June 9, 1994 (hereafter "Opinion").

On or about April 7, 1995, Petitioners filed a Motion for Summary Judgment, or in the alternative, Summary Adjudication of the Issues. On May 5, 1995, the court denied Petitioners' motion. Although the court did not address the issue of whether it had taken judicial notice of the California Court of Appeal opinion, the court held that collateral estoppel did not apply in this matter because the Respondents were not parties or in privity with the People (prosecutor) in the state court criminal matter.

On or about September 11, 1995, Petitioners submitted proposed jury instructions which included a special jury instruction, pursuant to **Federal Rules of Evidence, Rule 201,** regarding the effect of taking judicial notice of the Opinion. On or about September 11, 1995, Petitioners submitted their exhibit list which included as Exhibit 1, the Opinion. Upon being offered as evidence with proper foundation, the court sustained an objection to admit the Opinion into evidence. Upon a verdict by the jury after a trial, a judgment in favor of Respondents was entered on November 21, 1995. A timely notice of appeal was filed.

On or about May 15, 1997, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. The Court of Appeals held:

> [T]he question of the illegality of the search and arrest is not equivalent to the question of whether Respondents will ultimately be held liable. Even if Respondents' conduct had violated Petitioners' constitutional rights, the jurors were entitled to find the Defendants were shielded by qualified immunity because they reasonably believed that they were acting lawfully, and the jury in fact so found.

Upon Petitioners' request for rehearing, the Court of Appeals held that judicial notice was not appropriate; whether there was probable cause is not an adjudicative fact.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ: (1) in order to resolve a split between the federal circuit courts of appeals on two important questions concerning a plaintiff's rights in pursuing 42 U.S.C. § 1983 claims against peace officers; (2) because a court of appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision; and (3) because a United States Court of Appeals has decided an important question of federal law which has not been but, should be settled by the Supreme Court, and has decided a federal question in a way that conflicts with the applicable decisions of the Supreme Court.

"[U]nder the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior action. One who is not a party of record may be bound if he has sufficient interest and participated in the prior action." *Montana v. United*

States, 440 U.S. 147 (1979). Collateral estoppel is applicable even if one of the suits is in state court and the other is in federal court. *Allen v. McCurry*, 449 U.S. 90 (1980). In *Parklane Hosiery*, 439 U.S. 322 (1979) this Court approved of the use of offensive collateral estoppel. The doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity to an earlier action. *Chicago Rock Island & Pacific Railroad Co. v. Schendel*, 270 U.S. 611 (1926). "Privity is a concept not readily susceptible of uniform definition. Traditionally it has been held to refer to an interest in the subject matter of litigation acquired after rendition of the judgment through or under one of the parties, as by inheritance, succession or purchase. (citation omitted). The concept has also been expanded to refer to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights (citations omitted) and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." (citations omitted). *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.*, 120 Cal. App. 3d 622.[3]

Now twenty years later, the district court refused to permit Petitioners to utilize this doctrine to prevent relitigation of an issue decided in a state court in spite of the fact that the state court decision was a final decision, fully litigated through the state court of appeals and a party who had the community of interests and virtually represented respondents.[4]

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3. The reason for citing a California case as authority for the doctrine of collateral estoppel is that the state law of collateral estoppel governs not federal law. *Ayers v. City of Richmond*, 895 F.2d 1267 (9th Cir. 1990).

4. The Attorney General of the State of California represented the "People" in the criminal appeal and is representing Respondents in this matter.

Rule 201 of the Federal Rules of Evidence codified the doctrine of judicial notice. Only adjudicative facts are subject to judicial notice. Adjudicative facts are those that immediately affect only the specific litigants in the action. Questions of adjudicative fact must be resolved on the basis of the evidentiary submissions of the parties and they are the types of questions that in a trial would normally be submitted to a jury, or to a judge as the finder of facts. 1 K. Davis, *Administrative Law Treatise* § 7.02 (1958); *Patagonia Corporation v. Board of Governors of the Federal Reserve System,* 517 F.2d 803 (9th Cir. 1975). "The court will focus on legislative facts — those applicable to the entire class of cases — rather than adjudicative facts — those applicable only to the case before it. . . . APA [Administrative Procedure Act] defines adjudicative facts as 'facts pertaining to the parties and their businesses and activities.' " *National Organization for Women v. Social Security Administration of the Department of Health and Human Services,* 736 F.2d 727 (1984) (quoting Professor Davis at 2, *Administrative Law Treatise* (2nd Ed. 1979)).

In *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,* 971 F.2d 244 (9th Cir. 1992), the federal district court took judicial notice of a decision of the California Supreme Court.

In the case at bar, the Court of Appeals held that the determination of whether probable cause exists is not an adjudicative fact and thus judicial notice was not appropriate. The determination of probable cause involves the facts concerning the activities of only the peace officers involved in the arrest. Who did what to whom, when and why? These are adjudicative facts who are subject to judicial notice.

The result in unsupported by any case law or statute and is contrary to *Columbus Line, Inc. v. Gray Line Sight-Seeing*

Companies Associated, Inc. and *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.* The result permits a peace officer who has been found to have violated the Fourth Amendment rights of a person by arresting him without probable cause to argue in a subsequent action that there was probable to cause to arrest. The result permits two diametrically different decisions based on the same identical facts involving exactly the same persons.

I.

A PEACE OFFICER, WHO IS A DEFENDANT IN A 42 U.S.C. § 1983 ACTION, IS COLLATERALLY ESTOPPED FROM LITIGATING THE ISSUE OF PROBABLE CAUSE WHERE A STATE COURT HAS FOUND THAT THERE WAS NO PROBABLE CAUSE TO ARREST THE PLAINTIFF.

The issue of whether probable cause exists is a legal issue based on the evidence presented to the trier of fact. In a criminal proceeding, the issue of whether probable cause existed is determined by the court not the jury. Where there are material issues of fact in dispute, the court makes the determination of whether probable exists after a resolution of the adjudicative facts. "In reaching that determination, we reasoned that the issue of whether a confession is voluntary also requires the application of adjudicative facts to a legal standard and presents the same need for uniformity of meaning and consistency of application that the Supreme Court had encountered in Ornelas with respect to the determinations of reasonable suspicion and probable cause." *United States v. Mills,* 1997 U.S. App. Lexis 21118 (7th Cir.).

Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law

necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States,* 440 U.S. 147, 153 (1979). Changes in the burden of proof do not prevent the applications of issue preclusion. *Curtis v. Eikenberry,* 877 F.2d 802, 803, (9th Cir. 1989). "State law governs the application of collateral estoppel or issue preclusion to a state court judgment in a federal civil rights action." *Ayers v. City of Richmond,* 895 F.2d 1267, 1271 (9th Cir. 1990). Therefore, both the district court and the court of appeals should have looked to California law rather than federal law to determined the issue of collateral estoppel.

"The doctrine of res judicata provides that a final judgment on the merits bars the parties or those in privity with them from litigating the same cause of action in a subsequent proceeding and collaterally estops parties or those in privity with them from litigating in a subsequent proceeding on a different cause of action any issue actually litigated and determined in the former proceeding. [Citations omitted.] The application of the doctrine in a given case depends upon an affirmative answer to three questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? [Citations omitted.]" *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.,* 120 Cal. App. 3d 622, 628-629 (1981).

The first two prongs of the *Columbus Line* test are easily met in that the issue of probable cause was the issue in a suppression hearing and the subject of an appeal to the California Court of Appeal and there was a final judgment on the issue. The third prong of the test is the issue in the instant case: are these defendants in privity with or do they have a community of

interests with the State of California and the County of Kern. "A party technically not a party to the prior action may be bound by the prior decision if his interests are so similar to a party's that that party was his 'virtual representative' in the prior action." *United States v. ITT Rayonier,* 627 F.2d 996 (9th Cir. 1980); *Aerojet-General v. Askew,* 511 F.2d 719 (5th Cir. 1975). The virtual representation may be based on an express or implied legal relationship. California has adopted this view of community of interests. *People v. Sims*, 32 Cal. 3d 468 (1982); *Lewis v. County of Sacramento,* 218 Cal. App. 3d 214 (1990). "The courts have held that the agents of the same government are in privity with each other since they represent not only their own rights but the right of the government." *Sims, supra* at 487.

Three of the Respondents are employees of Kern County who also employed the district attorney who prosecuted the Petitioners in the state criminal matter. Respondent Miller is an employee of the State of California, Department of Justice who is the exact same governmental entity that handled the state appeal and this matter in the United States District Court and Ninth Circuit Court of Appeals. The four individual Respondents were more than mere witnesses in the state criminal case; they were the arresting officers, they aided the district attorney in its preparation of the prosecution, they were present in the courtroom as "investigating officers" during the trial and testified as witness on a number of occasions. It was their contradictory testimony which disclosed to the trial judge their ". . . conduct in surreptitiously entering the ranch and suppressing the fact" held the entire system up to ridicule, and Bray's and Lacertoso's testimony was "obfuscatory at best and bordered on absolute lying." In spite of the fact that the California Court of Appeal has determined that there was not probable cause to arrest, the district court placed the issue of probable cause before the jury which reached a different result than the California Court of Appeals.

The central purpose of collateral estoppel is to prevent different results by different courts based on the same facts involving the exact same persons. That has been the result in this case; the state court determined probable cause did not exist while a federal court took the opposite view.

II.

A FEDERAL COURT MUST TAKE JUDICIAL NOTICE OF A STATE COURT DECISION AND MUST BE GIVEN FULL FAITH AND CREDIT TO A STATE COURT JUDGMENT.

Rule 201 of the Federal Rules of Evidence provides that a court, when requested, must take judicial notice of an adjudicative fact which is one not subject to reasonable dispute which is either generally known within the jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Federal courts may take judicial notice of proceedings outside the federal judicial system if the proceedings have a direct relation to the matters at issue. *Green v. U.S. Penitentiary Warden*, 699 F.2d 364 (7th Cir. 1983). Accordingly, federal courts have taken judicial notice of court records, acts and proceedings in state court cases. *In re Phillips*, 593 F.2d 356 (8th Cir. 1979). The court may properly consider those matters which are a public record such as those documents on file in the courts of the State of California. *Mac v. South Bay Beer Distributors*, 798 F.2d 1282 (9th Cir. 1986). In a case directly on point, *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (1992), the Ninth Circuit held that the federal district court properly took judicial notice of a decision of the California Supreme Court.

> Generally, we will not consider facts outside the record developed before the district court. (citation omitted) However, we "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." (citations omitted except Bryant v. Carleson, 444 F.2d 353, 357 (9th Cir.) cert. denied, 404 U.S. 967, 92 S. Ct. 344, 30 L. Ed. 2d 287 (1971) (court took judicial notice of proceedings and filings in other courts, including a decision of the California Supreme Court issued while the parties' appeal in the federal case was pending)
>
> The proceedings before the California Superior Court are "directly related" to this appeal and may in fact be dispositive. Accordingly, we take notice of that court's final judgment, Clear Lake Indian Bingo Ltd. v. Robinson Rancheria Citizens Council, No. C 718613, (California Superior Court, December 28, 1990), and related filings.

United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d at 248.

The adjudicative facts of which the court must take judicial notice of are simply the ultimate facts of the particular case. "When a court . . . finds facts concerning the immediate parties — who did what, when, how, and with what motive or intent — the court . . . is performing an adjudicative function, and the facts are conveniently called adjudicative facts . . ." "Stated in other terms, the adjudicative facts are those to which the law is

applied in the process of adjudication . . . They relate to the parties, their activities, their properties, their businesses." 2 *Administrative Law Treatise* 353. An adjudicative fact is a certain fact of such a nature that a court, together with all men, has knowledge thereof without first having its attention directed thereto, while as to other facts a court may be without knowledge but will take judicial notice thereof if its attention is directed thereto. *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (10th Cir. 1946).

On or about October 20, 1994, Petitioners lodged with the court the "Opinion of the California Court of Appeal in People v. Gamboa, Case No. F017155" and requested the court take judicial notice of the "Opinion." The request was made in contemplation of a motion for summary adjudication of the issues by Petitioners, for purposes of attempting to limit the scope of a trial and/or, if a trial became necessary, having the jury instructed that the issue of probable cause has been conclusively decided and there was not probable cause to arrest or enter the ranch. Although the court gave no formal indication of whether it granted or denied the request, the court used and considered the "facts" contained in the Opinion in its consideration and decision of Petitioners' motion for summary judgment.

The Opinion of the California Court of Appeal in *People v. Gamboa,* Case No. F017155 meets all the criteria for the taking of judicial notice. It is an adjudicative fact which is "not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Opinion is directly related to this cause of action in that prior action arises out of the same transactions and events.

The Court of Appeals held that "Judicial notice is not

appropriate; whether there was probable cause is not an adjudicative fact." Without any authority or explanation, the court held that the factors on which a court determines whether probable exists and/or whether probable cause exists is not an adjudicative fact. The Seventh Circuit has held "[I]n reaching that determination, we reasoned that the issue of whether a confession is voluntary also requires the application of adjudicative facts to a legal standard and presents the same need for uniformity of meaning and consistency of application that the Supreme Court had encountered in Ornelas with respect to the determinations of reasonable suspicion and probable cause." *United States v. Mills,* 1997 U.S. App. Lexis 21118 (7th Cir.). The facts underlying the determination of whether probable cause exists are adjudicative facts as is the whether probable cause exists. A court in determining whether probable cause exists must weigh and determine the facts of that case; once the court determines what the facts are, the facts become adjudicative facts and are subject to judicial notice.

The determination that the underlying facts in the determination of probable cause and whether probable cause itself exists, are not adjudicative facts is unsupported by any evidence, case law and rule of evidence. To the contrary, the general rule is that the underlying facts in the determination of probable cause and whether probable cause itself exists, are adjudicative facts and subject to judicial notice when requested by a party.

CONCLUSION

For the foregoing reasons, Petitioner prays the Court grant a Writ of Certiorari.

Respectfully submitted,

RICHARD HAMLISH
Counsel of Record
Attorney for Petitioners
910 Hampshire Road, Suite X
Westlake Village, CA 91361
(805) 497-6632

Dated: September 29, 1997

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 15, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56805

D.C. NO. CV-94-03801-WJR

ABEL BERNARD MEDINA; BENJAMIN TIBURICO-TORRES; JESUS MANUEL CHAVEZ;

Plaintiffs-Appellants,

v.

EDWARD MILLER, individually and as an agent for the State of California Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARL BRAY, individually and as a detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a Sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a deputy for the Kern County Sheriff's Department.

Defendants-Appellees.

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding
Argued and Submitted May 7, 1997
Pasadena, California

Before: BROWNING and SCHROEDER, Circuit Judges, and RESTANI, U.S. Court of International Trade Judge.**

Abel Bernard Medina, Benjamin Tiburico-Torres, and Jesus Manuel Chavez, appeal from the pre-trial denial of their motion for summary judgment, after a jury verdict against them in their 42 U.S.C. § 1983 action. Appellants contend that the individual defendants-appellees violated their constitutional rights in an unlawful search and seizure and an arrest not supported by probable cause. The appellants' criminal convictions were overturned after the California Court of Appeal ruled that the government had not demonstrated probable cause. The appellants' principal contention is that the district court should have ruled as a matter of law in their favor on the issue of liability. Their theory is that the California court ruling precludes the individual appellees from relitigating the issue of probable cause.

The appellees contend that we lack jurisdiction to consider the issue because it was squarely raised in a motion for summary judgment that was denied before trial and is, therefore, not now appealable. *General Signal v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1506 (9th Cir. 1995) (citing *Lum v. City & County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992); *Locricchio*

** The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987), *cert. denied*, 116 S. Ct. 1017 (1996)). We conclude, however, that by offering jury instructions that effectively sought a directed verdict on the issue of the legality of the appellees' conduct, the appellants have adequately preserved the collateral estoppel question for our review.

We must, however, affirm the district court's judgment on the merits. The district court relied upon federal cases that squarely hold that individual law enforcement officers are not collaterally estopped by state court judgments that reverse criminal convictions on constitutional grounds. *See Davis v. Eide*, 439 F.2d 1077 (9th Cir. 1971); *Duncan v. Clements*, 744 F.2d 48 (8th Cir. 1984).

Appellants correctly point out that the controlling law for us to follow is California law, rather than federal law, but the principles are the same. Under California law, "a party will be collaterally estopped from relitigating an issue only if (1) the issue decided in the prior adjudication is identical with that presented in the action in question; and (2) there was final judgment on the merits; and (3) the party against whom the plea is asserted is a party in privity with the party to the prior adjudication." *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 874 (1979) (citing *Bernhard v. Bank of America*, 19 Cal.2d 807, 819 (1942)). "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." *Clemmer*, 22 Cal.3d at 875 (citations omitted). *See also Restatment (Second) of Judgments* § 39 (1982).

In this case, the individual appellees were not parties to the criminal case; there is no indication that they controlled that litigation; and the burden of proof in the criminal case was on the government to show the lawfulness of the search and arrest, whereas the burden of showing the unlawfulness in this civil action is upon the individual appellants. *Griffin v. Strong*, 739 F. Supp. 1496 (D. Utah 1990). Moreover, contrary to appellants' suggestions at trial and before this court, the question of the illegality of the search and arrest is not equivalent to the question of whether appellees will ultimately be held liable. Even if the appellees' conduct had violated appellants' constitutional rights, the jurors were entitled to find that appellees were shielded by qualified immunity because they reasonably believed that they were acting lawfully, and the jury in fact so found.

The County of Kern, although still denominated as a defendant-appellee, was granted summary judgment because appellants' failed to show *Monell* liability. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Appellants do not challenge that ruling on appeal.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 30, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56805

D.C. NO. CV-94-03801-WJR

ABEL BERNARD MEDINA; BENJAMIN TIBURICO-TORRES; JESUS MANUEL CHAVEZ;

Plaintiffs-Appellants,

v.

EDWARD MILLER, individually and as an agent for the State of California Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARL BRAY, individually and as a detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a Sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a deputy for the Kern County Sheriff's Department.

Defendants-Appellees.

ORDER

Before: BROWNING and SCHROEDER, Circuit Judges, and RESTANI, U.S. Court of International Trade Judge.*

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* The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

Appendix B

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the sugggestion for rehearing en banc and no judge of the court has requested a vote on the suggested for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied. Judicial notice is inappropriate; whether there was probable cause is not an adjudicative fact. The suggestion for rehearing en banc is rejected.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA DATED MAY 5, 1995 WITH ATTACHMENTS

B.C. Barmann, COUNTY COUNSEL
COUNTY OF KERN, STATE OF CALIFORNIA
By James H. Thebeau, Deputy (Bar # 128845)
Administrative Center
1115 Truxtun Avenue, Fourth Floor
Bakersfield, California 93301
Telephone: (805) 861-2326

Attorney for Defendants, COUNTY OF KERN, EARL BRAY, JOHN LACERTOSO and J.C. PLANK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 94-03801-WJR

ABEL BERNARD MEDINA, ABELARDO GAMBOA, BENJAMIN TIBURICO TORRES AND JESUS MANUEL CHAVEZ;

Plaintiffs,

vs.

EDWARD MILLER, individually and as an agent for the State of California Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARL BRAY, individually and as a detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a deputy for the Kern County Sheriff's Department; and DOES 1-100 inclusively,

Defendants.

Appendix C

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES

The motion of plaintiffs, ABEL BERNARD MEDINA; BENJAMIN TIBURICO-TORRES, Abelardo Gamboa, and JESUS MANUEL CHAVEZ, for summary judgment or summary adjudication of issues came on regularly for hearing before the court on May 1, 1995, the Honorable William J. Rea presiding. The plaintiffs were represented by Richard Hamlish, Esq. The defendants, COUNTY OF KERN, EARL BRAY, JOHN LACERTOSO and J.C. PLANK were represented by B.C. Barmann, Sr., Kern County Counsel, by James H. Thebeau, Deputy County Counsel. Defendant Edward Miller made no appearance.

Having considered the moving and opposition papers filed by all parties, the oral argument of the parties, all the admissible evidence submitted to the court and the inferences reasonably deducible therefrom, for reasons set forth in the attached Tentative Ruling,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion is denied.

Dated: _____

_____

William J. Rea, Judge
U.S. District Court
Central District of California

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 94-3801 WJR (JRx)

Docket Number: 3

Date: May 1, 1995

Nature of Motion: Plaintiffs' Motion for Partial Summary Judgment or Summary Adjudication on the Issue of Liability.

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

The Court is inclined to DENY plaintiffs' Motion for Summary Judgment.

DISCUSSION

"The doctrine of collateral estoppel may be applied in a § 1983 suit to preclude relitigation of a federal constitutional issue decided in state criminal proceedings." *Duncan v. Clements*, 744 F.2d 48, 51 (8th Cir. 1984) (citing *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)).

Appendix C

A fundamental principle of collateral estoppel is that the party against whom collateral estoppel is asserted must have been a party to or in privity to a party to the action that formulates the basis for asserting collateral estoppel. *Id.* Plaintiffs argue here that "defendants in the instant action are all in privity with the State of California and/or the County of Kern[.]" Plaintiffs' Memorandum of Points and Authorities in support of Motion for Partial Summary Judgment at 16.

Defendants, however, cite *Davis v. Eide,* 439 F.2d 1077 (9th Cir. 1971), to support their argument that collateral estoppel does not apply in this case.

In *Davis,* plaintiff brought a § 1983 claim against two Los Angeles City policemen to recover damages for violations of plaintiff's Fourth Amendment rights. In the criminal proceedings, plaintiff was convicted, but the California Court of Appeal reversed. In the civil action, the District Court submitted to the jury the question of whether probable cause existed to arrest plaintiff. Plaintiff argued that the District Court erred because the probable cause issue had been resolved in plaintiff's favor during the state proceedings and thus, defendants were collaterally estopped from disputing the issues in the civil action.

The Ninth Circuit rejected plaintiff's argument. The *Davis* court first explained that privity is defined to include "those who control an action although not parties to it * * *; those whose interests are represented by a party to the action * * *; [and] successors in interest * * *." *Id.* at 1078.

The court then concluded that "defendants were city police officers not directly employed by the state; they had no measure

of control whatsoever over the criminal proceedings and no direct individual personal interest in its outcome. In these circumstances there was no privity sufficient to invoke the doctrine of collateral estoppel." *Id.*

The *Duncan* case, *supra,* also supports defendants' argument. In *Duncan,* the Eighth Circuit explained that the State of Missouri was a party to the plaintiff's criminal proceedings and not the individual police officer. *Duncan,* 744 F.2d at 52. The court also stated that "merely because a person 'happen[s] to be interested in the same question, or in proving or disproving the same state of facts' " does not mean the two are in privity. *Id.* (citation omitted).

Moreover, the interests of the state in a criminal action "are not identical to those of an individual officer[.]" *Id.* The criminal forum is concerned with vindicating the "public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." *Id.* (quoting *United States v. Standefer,* 447 U.S. 10, 25, 100 S.Ct. 1999, 2008, 64 L.Ed.2d 689 (1980)). The civil forum, however, is concerned with ascertaining private rights.

Furthermore, an individual police officer has no control over the state's presentation of its criminal case. *Id.* The police officer also does not have a personal interest in the outcome of the case, and, more importantly, the police officer can not appeal the state court's decision regarding the evidentiary objections.

In light of the *Davis* and *Duncan* opinions, the Court is inclined to hold that plaintiffs may not assert collateral estoppel against the defendants here.

Appendix C

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF KERN

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action, my business address is 1115 Truxtun Avenue, Fourth Floor, Bakersfield, CA 93301.

On **May 3, 1995,** I had served the foregoing document(s) described as **ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES** on the interested parties in this action:

* * *

X by placing __ the original X a true copy thereof enclosed in sealed envelopes addressed as follows:

Richard Hamlish, Esq.
LAW OFFICES OF RICHARD HAMLISH
910 Hampshire Road, Suite X
Westlake Village, CA 91361-2804

David Adida, Deputy Attorney General
Office of the Attorney General
State of California
300 South Spring Street, Fifth Floor
Los Angeles, CA 90013

X **BY MAIL**

* * *

Appendix C

X As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **May 3, 1995,** at Bakersfield, California.

* * *

X (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

KAREN M. KITCHEN
NAME

s/ Karen M. Kitchen
SIGNATURE